Reemployment Assistance Appeals toolkit
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I have been a hearing officer in reemployment assistance/unemployment compensation in Florida since 1991. As the tone and content of what follows should make clear, this is written in my personal capacity; this is not an official statement of the Department of Economic Opportunity.

This is not a comprehensive practice guide for Reemployment Assistance Appeals hearings; rather, it is intended to be a collection of certain fundamental concepts to help make participation in RA Appeals a bit easier. Attorneys who get involved in reemployment assistance appeals hearings are likely to have expertise in other areas, and as a result they sometimes display the same kind of misconceptions about the reemployment assistance system that are held by other members of the public, and which are even occasionally displayed by judges in appellate decisions.

The standard pamphlet sent to parties to help them prepare for a hearing is:
DEO, Appeals Information Pamphlet
http://sitefinity.floridajobs.org/unemployment/download/uc/bulletin6-English.pdf
The standard guide for claimants, giving information about the process of filing for and claiming benefits is:
DEO, Claims Information Booklet
http://www.floridajobs.org/Unemployment/claimsservices/ClaimBookEnglish-(Rev%204-13).pdf
DEO, Benefit Rights Information Booklet
http://www.floridajobs.org/Unemployment/bri/bri_english.pdf
The Florida Department of Revenue has valuable Reemployment Assistance information, directed toward employers:
http://dor.myflorida.com/dor/taxes/reemployment.html#how
[Links good as of October 23, 2013]

Reemployment Assistance won't make you rich

Few practitioners specialize in reemployment assistance/unemployment compensation law, presumably because there is little money to be made in doing so. Fees for claimant representatives are paid by the claimant, at both the hearing level and for representation in proceedings before the Reemployment Assistance Appeals Commission (RAAC, or the Commission). However, fees have to be approved by the referee or Commission, presumably to make sure that claimants aren't beggared by fees even if they win the right to benefits. Because benefits are relatively low, the fees approved tend to be low—hundreds, rather than thousands of dollars. For practitioners who primarily represent businesses, the remunerative outlook isn't much better. The tax rate for businesses ranges from a minimum of about $82 dollars per

employee per year up to about $432 per employee per year. That sounds like it could be a target for some substantial savings. After all, if an employer has 1,000 employees, the difference amounts to three-quarters of a million dollars per year. But no particular case (other than some rare liability cases handled by Special Deputies) is likely to make any dramatic difference in an employer's tax rate. The employer's annual reemployment assistance tax rate is based on a three year running average of benefits paid to former employees divided by total payroll, modified by some general economic factors over which no single employer has much control. A business can reduce its tax rate if benefits paid to former employees aren't charged to the employer's account, but the time and expense of proving that a statutory non-charging provision applies may well cost more than the difference that a particular case would make in the employer's overall tax rate. There is an economic niche for practitioners to specialize in this area, but the practitioner has to be careful and frugal, or has to be motivated by some value other than the desire to be rich. Perhaps in recognition of the economic reality, representatives do not need to be attorneys, whether they are representing claimants or employers (even corporations). There are a few non-attorney claimant representatives who are passionate and quite competent, and sometimes human resource representatives for employers develop very high degrees of expertise in reemployment assistance hearings. The statutory provisions governing this aspect of the field are found in two places—sec. 443.041(2), Florida Statutes, and sec. 443.151(7), Fla. Stat. This instance of overlapping statutory provisions is a recurring feature of the reemployment assistance law.

Many entities

There are several entities involved in reemployment assistance/unemployment compensation. The system was renamed in 2012. Because the statute, Chapter 443, Florida Statutes, starts off with the creation of the Reemployment Assistance Appeals Commission (the Commission), some people, even judges, occasionally write as if the Commission was holding hearings, or as if hearing officers serve the Commission. The Commission can hold hearings, but almost never does. The Commission does not hire, supervise, or discipline hearing officers. The Commission reviews the decisions that the hearing officers issue. If the Commission summarily affirms a hearing officer's decision, then the hearing officer's findings of fact and conclusions of law become the decision of the Commission. This may contribute to the confusion revealed in some DCA decisions over what the Commission actually did. The hearing officers issue decisions that affirm, reverse, or modify determinations, which are issued by adjudicators. Adjudicators do an initial investigation, and they issue the state’s first ruling (the determination) on a claim for reemployment assistance.

The Department of Economic Opportunity employs the hearing officers, who work in the Office of Appeals. Hearing officers may be located almost anywhere in the state, but they are attached to administrative offices in Fort Lauderdale, Jacksonville, or Tallahassee. Hearing officers are

classed as appeals referees and Special Deputies.[1] Special Deputies hold the liability hearings: whether an employer must pay tax on a particular class of worker (a class that might have just one actual member), or whether an employer's tax rate was properly computed. Both special deputies and regular appeals referees can hold benefit hearings, which relate to issues such as whether a claimant is entitled to receive benefits, whether a claimant has an overpayment that needs to be repaid, and whether an employer's account is chargeable for benefits paid to a particular employee, as opposed to a class of employees. Reemployment Assistance appeals hearings are administrative hearings, but the proceedings in benefit hearings are governed by the reemployment assistance law, sec. 443.151, Fla. Stat., and ch.73B-20, Florida Administrative Code Rules rather than chapter 120, the Florida Administrative Procedure Act. On the other hand, the rules relating to Special Deputy hearings, ch.73B-10.035, FAC, do re-import the procedures of sec. 120.57, Fla. Stat.

There is another entity, called Workforce Florida, Inc., the members of which are appointed by the Governor, Senate President, and House Speaker. It oversees the workforce system, made up of "Regional Workforce Boards". The "workforce system" is a "public/private partnership" under which the regional workforce boards operate one-stop career centers. The workforce boards have names like "Workforce Escarosa," and "Workforce Solutions." Workforce Florida, Inc. is the public part of the partnership, and the regional workforce boards are the nominally private part of it. The one-stop career centers are supposed to help people find work and training. Don't expect to get much information from them about reemployment assistance appeals hearings. Sometimes workers in those offices do know about appeals, but it isn't something to expect. If there is a question about practice or procedure for a hearing, it is far better to call a deputy clerk in the Office of Appeals. There are some ordinary businesses, not part of the public/private partnership, that have names similar to the names of the regional workforce boards. For example, there is a company named "Equifax Workforce Solutions," in St. Louis, Missouri (formerly named Talx UC; it was called The Frick Company before that). Equifax Workforce Solutions is a company that processes payroll for a number of businesses around the country, and it also handles unemployment compensation/reemployment assistance matters. That business is not associated with the State of Florida. The Florida Department of Revenue enforces reemployment assistance tax law provisions.

The term "claim" means different things

The term "claim" causes confusion because it is used to mean at least three different things: there is the initial application for benefits, often called "the claim for benefits." This form is found

[1] There doesn't appear to be any definitive spelling convention about whether Special Deputy should be capitalized or not. The statute, ch. 443 Fla. Stat., leaves the title lower case, just as it does with "appeals referee". The main rule, 73B-10.035, Fla. Admin. Code, capitalizes the title sometimes and other times leaves it lower case. As special as Special Deputies are, it would be nice if our title was always capitalized, but it is nothing special if it is not.

online, at http://www.floridajobs.org/job-seekers-community-services/reemployment-assistance-center/file-a-claim. Next, the term "claim" refers to the whole package of reemployment assistance benefits available to a claimant, along with the conditions to be met for obtaining those benefits. A "claim" in this sense lasts for a year from the effective date.[2] The effective date is usually the Sunday of the week in which the application for benefits was filed. So, there might be comments from a referee about "the claim effective September 1, 2013" or there could be references to "the 2012 claim and the 2013 claim." When there are benefits available to be drawn upon, it is said that there is a "valid claim" or "a valid claim for benefits". But, confusingly, there is another use of the term "claim," which refers to the process of requesting benefits. A claimant has to request benefits for a particular week to be eligible to get them. The request must be done online, with rare exceptions. The request is made by answering questions on a questionnaire. By answering the questions the claimant is certifying that the eligibility conditions have been met. It must be done biweekly. In the statute and rules the biweekly request or certification for benefits is called a "continuing claim". The process is also called "reporting on a claim," a holdover from the days when people had to physically stand in unemployment lines and report in person regularly to claim their benefits. There are no unemployment lines in Florida anymore, except for the lines on which computer data travels.

Reemployment Assistance/Unemployment Compensation is a tax system

The unemployment compensation/reemployment assistance system is, at base, an excise tax on employment. The system was set up that way in the 1930's to avoid Tenth Amendment and Commerce Clause issues. So, even though in fact the intent is to provide benefits to certain individuals, in form the payment of benefits is incidental. There is a Federal tax and a state tax. At the Federal level, unemployment compensation was created along with Social Security. The two programs are administered separately, but it is sometimes helpful to remember that they are fraternal twins. The Federal government regulates the state systems by means of statutory provisions and regulations which each state must comply with or risk losing Federal money. The law at the Federal level can be instructive, but instances where it is decisive are rare. The reemployment assistance system is still primarily a state system, governed by state law.

Reemployment Assistance money is state money

Reemployment assistance benefits are benefits paid by the state from the Unemployment Compensation Trust Fund. The money in that fund comes from state reemployment assistance taxes and from Federal unemployment compensation taxes. It is not unusual to hear a claimant

[2] In bad economic times, Congress may authorize funds for additional benefits, so that benefits could be payable for much more than a year. These benefits are called Emergency Unemployment Compensation (EUC). The additional benefits are often called "extended benefits," but there is a category of last resort benefits that is formally designated "Extended Benefits" (EB). Those are payable only in what are deemed very dire economic circumstances. EB is payable only after EUC is fully exhausted.

say, “But I'm not claiming benefits from that employer; it's my last employer I was claiming on,” or, “I don't know why this employer is involved. I worked for them just a couple of weeks. It's the company I worked at for twenty years that I'm claiming against.” But that view of reemployment assistance as coming from any particular employer is wrong. Benefits are paid by the state, from state funds, so a claimant has to meet the various conditions set out by the state statutes and rules in order to get benefits. Sometimes both the employer and the claimant want benefits to be paid and they express frustration when their agreement isn't implemented. But that is because the reemployment benefits don't belong to either of them, until the state pays benefits to the claimant; and even then the state reserves the right to get the benefits back if it turns out that some condition of payment wasn't actually met.

Reemployment Assistance benefits some, but reduces employment

We could wish it to be otherwise, and may feel that the benefits of the system outweigh the costs, but there is no sense in pretending that the system has no costs beyond the taxes that must be paid. Basic economics tells us that taxing employment will generally mean that there is less employment than there otherwise might be, and payment of benefits to those who are not working creates a disincentive to work. The New Deal architects of unemployment compensation recognized this, and many of the features of the reemployment assistance system can be viewed as ways of mitigating this aspect of the system. For example, benefits are intentionally kept relatively low, and are allowed for a relatively short period of time, so that returning to work is less unattractive. Once benefits are payable, a certain (low) level of work and earnings is allowed before benefits are cut off. A certain level of work and earnings is required before there can even be eligibility for benefits. A claimant is disqualified from receiving benefits if the claimant is considered to be the primary cause of the unemployment. The claimant is required to seek work, and can be cut off from benefits if suitable work is refused without good cause. These aspects of the system are to make sure that benefits are going to those who are truly workers or potential workers; those who are, as the phrase goes, “attached to the labor market.”

Benefits are not expressly means-tested. This is to keep the benefit system simpler. At one time, many years ago, there was a strong preference for the work search to consist of in-person job contacts. That preference, coupled with the cap on the weekly benefit amount, meant that for high income people the process of claiming benefits did not always produce an attractive ROI. But with the acceptance of online job searching that issue has diminished substantially. Benefits are currently capped at $275 per week; and total regular benefits are limited according to a sliding scale that depends on the official unemployment rate. For many years regular benefits were allowed for up to half a year, 26 weeks. The legislature limited benefits to a maximum of 23 weeks in 2011. The maximum amount of regular benefits is currently $5225—19 weeks—but since the unemployment rate in Florida as of this writing (late 2013) is dropping, the total regular benefits allowed will probably drop, too. The unemployment rate, by the way, is based on

surveys by the Federal and State bureaus of labor statistics, so the unemployment rate doesn't depend on the number of people claiming benefits.

People sometimes express surprise that benefits are taxed as ordinary income. The rationale is that benefits are partially replacing wages. In some ways they are like deferred or contingent income, such as sick pay or vacation pay, though the available credits on a claim are not vested benefits. If the state legislature decided to end the reemployment assistance system tomorrow, it would not have to pay any further benefits: sec. 443.061, Fla. Stat.

Twenty days!

There is a limited time within which to take certain actions, which sometimes catches practitioners unaware. When a claim for benefits is filed, a notice is sent to past employers requesting information. An employer's response to the notice of claim must be filed within 20 days of the mailing date of the notice. In the absence of a timely response, the employer's account is charged for benefits paid to that former employee, even if the account could have been relieved of charges, due to, for example, a disqualifying separation of the claimant. There are only 20 days to file an appeal to a determination. Since the action is called an "appeal" it might be thought that a 30 day limit applies, but a reemployment assistance appeal is actually an evidentiary hearing. The 20 days to respond to the notice of claim, or to file an appeal, starts on the mailing date of the notice or determination, which is presumed to be the mailing date noted on the form itself, if there is a mailing date noted. If it can be established that the notice or determination wasn't properly mailed (or if there is no mailing date noted on the document) the 20 days start at a later date, the date of receipt. The 20 days in which to file is not modified by any extension for mailing; but on the other hand, the filing of the appeal is when it is postmarked (if mailed) rather than when it is received by the Department. Appeals online or by fax are filed when they are officially received by the Department—a confirmation number is generated for online appeals, and faxes are date stamped, but the date stamp presumption can be overcome with suitable proof of a fax confirmation. An online appeal that never generates a confirmation number is not an appeal, and unfortunately there sometimes must be more than one attempt before an appeal goes through online. In a case where there is any difficulty about getting a confirmation number, it is a good idea to send a letter, too. Appeals can be filed all three ways simultaneously, and if any of those protests is timely then there is a timely appeal. An appeal has to be a written protest, though that requirement is construed very liberally in favor of finding an appeal. The reemployment assistance system does not participate in the electronic filing system that applies to the judicial branch.

The Determination governs

The determination is presumptively correct. This isn't expressly stated in the statute, but it would be inconsistent with the statute and rules if it were otherwise: if the determination wasn't presumptively correct, it would evaporate upon an objection and there would not need to be any hearing. A claimant would get benefits just by filing an appeal, and the mere filing of an appeal

would relieve an employer's account of charges. Instead, if an appeal is filed but the appellant fails to appear at the hearing, the appeal is dismissed and the determination continues in force.

Eligibility vs. Disqualification

The distinction between issues of eligibility and issues of disqualification is fundamental, but the distinction is unfortunately often overlooked. A discussion of the distinction appears in Florida Industrial Commission v. Ciarlante, 84 So. 2d 1 (Fla. 1955), an old case, but still good law. One of the frustrating features in the recent computer system upgrade (called "Connect") being implemented by the Department is that the software was prepared originally for another state which apparently doesn't stress the eligible/disqualified distinction very much. Consequently, there may be references in the online system to 'eligibility' that are actually references to the disqualification provisions. If a claimant meets all of the eligibility requirements, and is not subject to any disqualification, the claimant can be said to be entitled to benefits.

Eligibility is governed by sec. 443.091, Fla. Stat. The burden of proving eligibility issues is generally on the claimant. This includes such requirements as:

- that the claimant be unemployed, either totally or partially;
- that the claimant has properly applied for benefits, including registering and completing a skills review (unless exempt);
- that the claimant has a demonstrated history of work and wages on which reemployment taxes would have been paid—this is called monetary eligibility;
- that the claimant is able to work and available for work, which includes actively seeking appropriate work; and
- that the claimant has properly requested benefits for any particular week of unemployment.

The first determination on a claim is the "wage transcript and determination," which sets out the wages in the base period that the Department recognizes. The wages are generally based on employer reports. A finding of eligibility as set out on the wage transcript is sometimes taken to mean that the claimant is entitled to benefits. But the claimant has to meet all of the other conditions in order to actually get benefits. Supposing the eligibility conditions are met, there are other conditions that might derail benefits: there might be a disqualification.

Disqualification is governed by sec. 443.101, Fla. Stat. Normally, the burden of establishing a disqualification is initially on the employer, but in a few cases, once that burden has been met, the burden shifts to the claimant. This is the case for a voluntary quit: there must be evidence to establish that the claimant quit, and then, but only then, does the claimant have to establish that the quit was with good cause, as defined in the statute. Hearing officers are required to develop the record. Among other things, the Federal Review Criteria by which referees are evaluated

require referees to get reasonably available evidence. Because of that, referees are likely to press, at least a little bit, to get information about the details of a separation, even when the claimant is the only participant in a hearing. That means that sometimes a claimant will admit to actions that establish disqualifying misconduct, even though the burden of proof on that issue is on the employer. In light of that, advocates will sometimes instruct their clients not to answer questions, but that can be taken too far. The presumption of the correctness of a determination imposes at least some burden of going forward on the appellant, whether claimant or employer. If the claimant filed the appeal, the claimant will have to carry the burden of proof of eligibility, which is on the claimant: so the claimant will at least have to answer whether he or she worked for the employer involved in the hearing, and if so, when the employment ended.

The distinction between eligibility and disqualification is sometimes blurred, even by the Florida Legislature: the monetary eligibility provisions are in sec. 443.091(1)(g), Fla. Stat., right where they should be, but the provisions show up again in sec. 443.111, Fla. Stat., "Payment of Benefits,' where the title of section 2 is "Qualifying requirements." There are subtle differences between the two overlapping provisions, and one could quibble that "Qualifying" isn't just the inverse of "Disqualification," but the statutory term is unnecessarily confusing. There are other instances where the two categories are mixed up, as in sec. 443.101(1)(a)4, Fla. Stat. where it is provided that if a claimant is notified of an impending discharge and the claimant leaves the employment during that notice period, the claimant is, "*ineligible for benefits pursuant to s.* 443.091*(1)(d) for failing to be available for work for the week or weeks of unemployment occurring before the effective date of the discharge.*" The full effect of the specific wording is hard to discern. But fortunately that provision is rarely invoked. It would have been better if the legislature had expressed itself in different terms.

There are only two kinds of separation from employment

The reemployment assistance law recognizes two kinds of separation from employment: discharge and quit. A layoff is a kind of discharge. Abandonment of a job is a kind of quit. Sometimes practitioners, even referees and the Commission, use the term, "constructive discharge," by which they mean that the employer has acted so badly toward the claimant that the claimant quit. This is a term imported—improperly—from employment discrimination law. The reemployment statute, sec. 443.101(1)(a)1, Fla. Stat. already defines good cause as:

> As used in this subsection, the term "good cause" includes only that cause attributable to the employing unit which would compel a reasonable employee to cease working or attributable to the individual's illness or disability requiring separation from his or her work.

Consequently, there is no need to use the term 'constructive discharge' for cases where an employer has, for example, repeatedly failed to pay wages in full and on time; or where the employer maintains an unreasonably unsafe workplace; or where there is ongoing sexual harassment or racial discrimination. Those situations will be good cause for quitting. There is a

situation where the term 'constructive discharge' might be appropriate in reemployment assistance situations, one where it is not necessarily clear whether the separation from employment was a quit or a discharge: the employer announces that if the employee is absent on some scheduled day of work the employee is fired; the employee is absent that day for some reason which is considered beyond the employee's control; and the employee does not return to work because of the employer's announcement. An example of this situation is in Szniatkiewicz v. Unemployment Appeals Commission, 864 So. 2d 498 (Fla. 4th DCA 2004).[3] Since the employer set the separation machinery in motion, this can be considered a discharge; but since the claimant did not return to work it looks like a quit. This situation can be deemed or construed to be a discharge rather than a quit, and so the term "constructive discharge" would fit this scenario. But that would cause confusion with the use of the term in other areas of law, so it is best just to eliminate references to 'constructive discharge' in reemployment assistance matters. Decide if the separation is a quit or a discharge and stick to that terminology. Or just use the neutral term, "separation".

Traps for the unwary

Evidence: some special provisions establishing the evidence considered competent in reemployment assistance hearings are set out in sec. 443.151(4)(b)5, Fla. Stat.:

> 5.a. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.
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> b. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court.
>
> c. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding s. 120.57(1)(c), hearsay evidence may support a finding of fact if:
>
> (I) The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and
>
> (II) The appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

The typical procedure is that the referee accepts hearsay without ruling on or commenting on admissibility, and then the referee figures out post-hearing which evidence can actually be used as competent evidence. That can mean that a party thinks it has presented much more evidence than it actually has. The "commonly relied upon by reasonably prudent persons" provision is

[3] This case is cited for several different reasons, but I can't help feeling that the apparent orthographical tangle of the claimant's name is a strong factor in its popularity.

rarely invoked as a specific source of competent evidence, so it is not very clear what additional relevant evidence that provision allows. The Commission has invoked that provision to allow testimony about the images on a surveillance video, excluding any linguistic content that would fall under the hearsay provisions. The use of hearsay for "supplementing or explaining other evidence" provision is not much clearer, but such hearsay has sometimes been invoked as a way of determining credibility where there are conflicts in the testimony. The "trustworthy hearsay" provision is not much used either, because it is rarely the case that suitably trustworthy hearsay won't already be covered by a standard hearsay exception.

Probationary Discharge: Normally, a nondisqualifying separation from employment means that an employer's account will be charged, if it is in the claimant's base period, leading to a potential increase in tax rate. Section 443.131(3)(a)2, Fla. Stat. sets out a situation where a claimant gets benefits, and the employer's account is not charged. An employer can hire an employee under a standard probation provision, and if the employee is fired during probation simply because he or she isn't good enough, the employee can get benefits (having been discharged for reasons other than misconduct) but the employer's account can be relieved of charges. This is designed to reduce an employer's reluctance to hire an untried worker. However, the provision has a number of requirements, all of which must be met. It has to be a standard probationary period, applicable to all employees or at least all of a class of employees; it has to be for no more than 90 days; it applies only to new employees (therefore, probably not to an existing employee in a new position); the employee has to be notified of the probation period within a week of starting work; the employee has to have been fired during that period—not during an extension, for example; and the discharge has to have been for unsatisfactory performance and for no other reason. The provision doesn't apply to temporary work. The employer has to respond to the Department's notice of claim within the required 20 days. A misstep on any one of those requirements and the employer's account is not relieved of charges.

Temp Agency and Employee Leasing Company notices: There are various ways of sectioning off the administrative aspects of employment—payroll, taxes, and benefits—from the actual direction and provision of services. For convenience in referring to temp agencies, employee leasing companies, and day labor firms, the term administrative employer is sometimes used, though that is not a term found in the statute. Employee leasing companies and temporary employment agencies—called temporary help firms in the statute—have internal employees and external employees. The internal employees are the administrative staff of the firm; the external employees are the workers who are sent on assignments to work for client companies. Employee leasing companies are sometimes called PEOs—professional employer organizations. Sometimes a company has both a temp agency branch and an employee leasing company branch. The difference is supposed to be that temp agencies typically supply a few workers to a client company for a short time; while an employee leasing company typically has the whole client

company workforce on its payroll. Employee leasing companies are regulated under ch.468, Fla. Stat. Day labor firms are regulated under ch.448, Fla. Stat. A special disqualification provision appears in sec. 443.101(10), Fla. Stat. relating to administrative employers. Under that provision the end of a work assignment is converted from a discharge/lay off to a disqualifying quit if the worker assigned to the client company was given proper notice and the worker fails, without good cause, to report for further work to the administrative employer. This looks like a great benefit to administrative employers, since a disqualifying quit would be a basis for relieving the employer's account of charges, but it is easy for the company to miss out. Since this provision is in the disqualification section, sec. 443.101, Fla. Stat, rather than in the chargeability section, sec. 443.131, Fla. Stat., the notice provisions are construed against disqualification. The notice to the claimant doesn't have to repeat the statute verbatim, but it does have to provide all of the information set out in the statutory provision. Many notices fail to comply, especially if a firm is active in many states and has a standard notice form that it uses in all of them. The notice must be given at the time or times specified in the statute or it is not effective. Giving the notice too early is just as fatal as giving it too late. Temp agencies have to give the notice at "the time of hire," and employee leasing companies have to give the notice then, and also at the end of the assignment. Day labor firms have special rules that look complicated, but in practice amount to a requirement that a physical "return ticket" must be issued to the day laborer to invoke the special provision. The concept of reporting back to the administrative employer for reassignment is construed liberally, in favor of the claimant, as is the concept of good cause for failing to report.

Between terms: Public schools and some private non-profit schools can benefit from a special eligibility provision. Since the schools are typically seasonal, with relatively lengthy breaks between certain school terms or school years, workers might file for reemployment assistance benefits between the school terms, to the detriment of the schools' budgets. The special provisions of sec. 443.091(3), Fla. Stat. are mind-numbingly complex at first reading—and often upon any later reading—but they do have a consistent ascertainable meaning. Simplifying somewhat, a school worker who will be working again for the school after the summer recess or other school holiday is not considered unemployed, as related to the school, during that summer recess or school holiday. Just as an ordinary worker isn't unemployed over the weekend or while on a two-week vacation, the school worker isn't unemployed, with respect to the school, between, say, early June and mid-August when regular classes aren't being held. You will notice the qualifier, "with respect to the school". If a school worker has the school job as just one among other jobs, there might be a valid claim that can meet the monetary eligibility requirements by excluding the school wages during the between-terms period. Note, too, that since the between-terms requirements only operate to exclude school wages, it is sometimes the case that a new teacher, with no school wages in the base period, will be eligible for benefits during the first summer recess with the school, but not eligible during subsequent years.

Misconduct has many forms

Misconduct is defined in five subparagraphs, a. through e., which are to be construed independently—the statute specifically admonishes that they are not to be construed *in pari materia*. The definition of misconduct was revised in 2011 and again in 2013. Appendix I contains the old traditional definition and the newer versions. Subparagraphs a. and b. essentially incorporate the older definition of misconduct. Under that definition, an isolated incident was generally not disqualifying misconduct, though a single instance of dishonesty, criminality, or outrageous public insubordination could be. Case law from before 2011 is, then, still good law for construing the meaning of subparagraphs a. and b., and also probably for the first clause of subparagraph c., which refers to chronic absenteeism or tardiness. Subparagraph c. needs to be read very carefully. It is not as wide-reaching as it may seem at first. Subparagraph e., relating to violation of a rule, needs to be read very carefully, too. Since it is a disqualification, it is construed narrowly, so any employer rule must be expressly proven. It is not required that the rule be in writing, but without written rules it is that much harder to establish what a particular rule provides, and whether the claimant had notice of it, and therefore that much harder to establish that the rule has been violated. The rule involved must be a rule of conduct, rather than merely a statement of a desired outcome. Otherwise, every employer would adopt a rule saying, "An employee must never be unsatisfactory to the employer," and so anything that might cause an employer to discharge an employee would be disqualifying misconduct. Once the rule has been established, and if it has been shown that the rule was violated, the burden of proof shifts to the claimant to establish one of the defenses. The notion of whether a rule has been "fairly" enforced, as opposed to whether it has been consistently enforced, usually is an issue of whether the claimant could actually have complied with the rule—if there are conflicting rules, such that the claimant had to break one to comply with another, and the claimant was disciplined for it, then the rule hasn't been fairly enforced. Similarly, if the claimant could not have complied with the rule even with the best will in the world, then enforcement of the rule has not been fair. The term, "reasonably related" has two aspects: there must be some nexus between the operations of the employer and the rule that is to be enforced; and the rule must be reasonably proportional to the employer's legitimate interest.

[Three appendices, on separate pages, follow.]

Appendix I— Three Definitions of Misconduct, sec. 443.036, Florida Statutes:

2010 and before:

(29) "Misconduct" includes, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating willful or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

As of June 27, 2011--

(30) "Misconduct," irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.

(b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e) A violation of an employer's rule, unless the claimant can demonstrate that:

1. He or she did not know, and could not reasonably know, of the rule's requirements;
2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

As of May 17, 2013:

(30) "Misconduct," irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer; or

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e) 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rules requirements;

b. The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

Appendix II. Selected References.

Chapter 443, Florida Statutes, particularly:

- 443.036 Definitions
- 443.041 Waiver of rights prohibited; fees regulated
- 443.091 Eligibility
- 443.101 Disqualification
- 443.111 Payment of benefits
- 443.1215 & 1216 Employers and Employment
- 443.131 Tax rate
- 443.151 Claims and Appeals; fraud

Federal Law

- 26 USC 3301ff, The Federal Unemployment Tax Act.
- 20 CFR sec. 601ff, "Employees Benefits," Employment and Training Admin., Dept. of Labor.
- 26 CFR sec. 31.3101-131.3406, "Employment Taxes and Collection of Income Tax At Source."

DEO, Appeals Information Pamphlet
http://sitefinity.floridajobs.org/unemployment/download/uc/bulletin6-English.pdf

DEO, Claims Information Book
http://www.floridajobs.org/Unemployment/claimsservices/ClaimBookEnglish-(Rev%204-13).pdf

Florida Department of Revenue Reemployment Assistance Tax info:
http://dor.myflorida.com/dor/taxes/reemployment.html#how

Appendix III— significant aspects of the claim process, from an appeals perspective.

The application for benefits is filed online. The initial steps are set out in the Claims Information booklet, and subsequent steps are set out in the Benefits Rights booklet, both of which were mentioned at the beginning of this toolkit. In addition to filling out the application, the claimant has to take a skills test, the Initial Skills Review, which is supposed to help the Department to determine what remedial services a claimant might need. The claimant also has to complete a work registration, essentially filing a resume, which is supposed to help the Department determine what jobs to refer the claimant to. The Department of Economic Opportunity, DEO, has to determine whether there is a valid claim: whether the claimant meets the condition of monetary eligibility. The Department must look at a base period—the first four quarters of the five completed quarters prior to the effective date of the claim. The rate at which benefits are paid depends on the high quarter: the quarter in which the highest amount of wages were paid. The base period is a one year period of time, but not necessarily a calendar year. The base period often contains portions of two different calendar years. Benefits might well depend on an employer different from the last employer, or even the last two or three employers that a claimant had. The emphasis is on quarters of a year: most employers must file a quarterly reemployment assistance tax return. The tax return tells the Department what wages should be credited to a claimant. This helps to explain why monetary eligibility depends on work that was done perhaps a year and a half prior to the separation from employment. The taxes that would be used to pay benefits should have already been collected by the time a claim for benefits is filed. To meet the requirements of monetary eligibility, a claimant must have wages in at least two base period quarters, totalling at least $3400; and the total wages must be spread over the base period in such a way that total wages equal or exceed 1.5 times the high quarter wages. This provision is usually called the "high quarter" requirement. It has the effect of establishing that a claimant was engaged in on-going work, as opposed to having gotten some unique windfall which is then leveraged by being characterized as wages. Sometimes a large bonus, or a big commission, or a long period between the separation from employment and the filing of a claim, renders a claim monetarily ineligible even though the total base period wages are well above the minimum required amount. In such a case, wages can sometimes be adjusted so that they are credited to the quarter in which they were earned, rather than the quarter that they were paid; but when such a procedure is followed it does not always result in monetary eligibility, because wages that were outside of the base period might be drawn into the high quarter, or wages in the initial quarter of a base period might be moved out. If wages are credited to the quarter earned, the procedure is followed for the whole base period, not just a couple of quarters. Alternatively, since the base period depends on when a claim for benefits was filed, waiting a few weeks and then filing a new claim in a new calendar quarter can sometimes resolve the problem. Wage credit hearings are always much easier when the parties are prepared to show what wages were paid in the various base period quarters. A W-2 is not the full battle; it is not even half the battle: it is, if you will pardon the expression, more like just a quarter of the battle. Paycheck stubs, especially those with cumulative, year-to-date totals, are immensely valuable.

But not every instance of earning money produces base period wage credits. There are a number of specific exemptions, which are set out in sec. 443.1216 (13), Fla. Stat. The burden of establishing monetary eligibility is on the claimant. Money earned as an independent contractor is not wages. Independent contractors aren't employees. Self-employed people aren't employees. The rationale is that employees are servants of the principal. A person isn't his own servant. The same rationale leads to the conclusion that a general partner in an ordinary partnership isn't an employee either. Generally, though, the issue comes up when a worker asserts he was an employee and the business asserts that the worker was an independent contractor. It is only a slight exaggeration to say that in Florida the issue of whether a worker is an independent contractor or not is merely an extended commentary on Cantor v. Cochran , 184 So.2d 173 (Fla. 1966), which adopted the factors set out in 1 Restatement of Law, Agency 2d Section 220 (1958). Shortly after a claim for benefits is filed, a notice of claim is sent to the employers who are in the base period, and to those that might have an effect on whether benefits are paid; at least so far as such employers are known. The notice of claim is the employer's first chance to give information about how a claimant became

unemployed. In order to encourage responses from employers, an employer's account cannot be relieved of charges if it did not respond to the notice of claim within the allowable time limits, 20 days from the noted mailing date. An adjudicator looks over the paperwork on the claim—the claim for benefits, the employer's response to the notice of claim—and sometimes engages in further investigation. The adjudicator will issue a determination, the first ruling by the state about whether benefits should be paid or not, and about whether an employer's account is charged for benefits paid. The appeal of the determination leads to reemployment assistance appeals hearings before a hearing officer.

The claimant must certify his or her eligibility for benefits every other week, usually on a Monday or a Tuesday. This is also called a request for benefits. If the certification day is missed, it can still be done up to the time of what would have been the next certification date—in other words, a certification or report or continuing claim can be up to 14 days late. If the attempted certification is later than that, then the claimant must start the claim series over, missing out on the weeks for which there was an untimely report, unless—and it is a big "unless"—the Department prevented the claimant from certifying. This happens when there is an ineligibility determination that has not been appealed. It may happen for other reasons, such as Department computer system problems. The claimant logs in, and when a certification is attempted, the message is returned, "There are no weeks to be claimed." At that point, the claimant can attempt to contact the claims information call center. A telephone number should be provided with the message. Getting through to a call center representative is not always easy.

Assuming the certification attempt goes through, the claimant answers a series of questions and submits a list of potential employers contacted. The certification covers a one week period, so once the claimant finishes with one week, the same process has to be repeated for the next week. If there is no problem on the claim, the process continues until the claimant has exhausted the claim.